Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Accelerating Wireless Broadband Deployment by	)	WT Docket No. 17-79
Removing Barriers to Infrastructure Investment	)	

COMMENTS OF THE
TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Telecommunications Industry Association ("TIA")[1] hereby files these comments in response to the Notice of Proposed Rulemaking ("NPRM")[2] in the above-captioned proceeding. TIA applauds the Commission's efforts to accelerate wireless facilities deployments, and broadly supports the proposals in the NPRM. As the Commission has noted, the demand for wireless services continues to increase at a rapid rate,[3] with both existing and new services like 5G expected to depend heavily upon more dense wireless networks that make use of small cells.

In recent years, however, actions by state and local governments have too often presented obstacles to such deployments. The record developed in response to the Commission's recent

[1] TIA is the leading trade association for the information and communications technology ("ICT") industry, representing companies that manufacture or supply the products and services used in global communications across all technology platforms. TIA represents its members on the full range of policy issues affecting the ICT industry and forges consensus on industry standards.

[2] Notice of Proposed Rulemaking, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC 17-38, WT Docket No. 17-79 (adopted Apr. 20, 2017).

[3] NPRM ¶ 1 (citing Cisco Visual Networking Index data).

Public Notice on streamlining deployment of small cell infrastructure[4] includes many such examples. Commenters described how their engagements with localities are often plagued by undefined laws and processes, redundant or fragmented procedures, and onerous fees.[5] Thousands of dollars are sometimes charged for inspection of each site, even for small cells in which hundreds of units may be needed for a single deployment,[6] and some consultants have turned the business of collecting fees for siting applications into an art form.[7] Even Section 6409(a) of the Spectrum Act, which provides a "deemed granted" remedy for certain applications, has not always been implemented consistently.[8] The Commission can and should address these obstacles, and adoption of the proposals in the NPRM would represent a significant step forward in that direction.

I. The Commission Should Adopt a "Deemed Granted" Rule.

A "deemed granted" rule that interprets Section 332(c)(7) of the Communications Act would help address many of the challenges summarized above, and the Commission should adopt this proposal. This remedy would obviously provide greater incentive for state and local governments to move ahead quickly with application review, and would avoid delays in network buildout that deprive consumers of the ability to access next-generation services. The remedy would also reduce costs of litigation, thus promoting more rapid deployment.

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[4] Public Notice, *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, DA 16-1427, WT Docket No. 16-421 (Dec. 22, 2016).

[5] *See, e.g.*, Comments of Nokia, filed March 8, 2017 in WT Docket No. 16-421, at 4-6 ("Nokia PN Comments"); Comments of Crown Castle International Corp., filed March 8, 2017 in WT Docket No. 16-421, at 11-14 ("Crown Castle PN Comments").

[6] Nokia PN Comments at 6.

[7] Nokia PN Comments at 7-8.

[8] Crown Castle PN Comments at 20; Nokia PN Comments at 5.

The Commission's legal authority to make policy in this area is clear, since the Fifth Circuit explicitly held in *City of Arlington v. FCC* that the Commission retains authority to adopt rules that interpret Sec. 332(c)(7) of the Communications Act.[9] The Commission should also strongly consider acting by rulemaking,[10] rather than merely issuing or updating a prior declaratory ruling. The NPRM expresses some concern about the Commission's authority to promulgate a rule interpreting Sec. 332(c)(7) due to certain language from the 1996 conference report, of which the key portions are quoted below:

> It is the intent of the conferees that … the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated.[11]

However, the legal reality today is quite different from when the Commission's *2009 Declaratory Ruling* first established the 90-day and 150-day shot clocks.[12] Specifically, the Fifth Circuit made very clear in *City of Arlington* – an opinion later upheld by the Supreme Court – that the Commission has abundant authority to clarify the various limitations in Sec. 332(c)(7)(B):

> Although the legislative history surrounding the passage of § 332(c)(7) indicates Congress intended the provision to remove from the FCC the authority to make new rules limiting or affecting state and local government authority over wireless zoning decisions, the legislative history, like the statute itself, is silent as to the FCC's ability to use its general rulemaking power to provide guidance with respect to the limitations § 332(c)(7)(B) expressly imposes on state and local governments. In other words, the legislative history does no more than indicate Congress's intent to bar the FCC from

[9] 668 F.3d 229, 247-54 (5th Cir. 2012).

[10] *See* NPRM ¶¶ 15-16.

[11] S. Rep. No. 104-230, at 208 (1996); *see also* NPRM ¶ 16 (inquiring whether and how the report language impacts the Commission's authority).

[12] Declaratory Ruling, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review etc.*, FCC 09-99, WT Docket No. 08-165 (Nov. 18, 2009) ("2009 Declaratory Ruling"), *aff'd, City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

> imposing *additional* limitations on state and local government authority. It does not indicate a clear intent to bar FCC implementation of the limitations *already expressly provided for* in the statute.[13]

Moreover, the Fifth Circuit made clear that although the Commission originally acted via declaratory ruling, it should have issued a rule instead. In the context of an APA challenge, the court specifically considered "whether the FCC abused its discretion or otherwise violated the law by promulgating the 90- and 150-day time frames through adjudication rather than rulemaking," stating that "[o]n this point, we harbor serious doubts as to the propriety of the FCC's choice of procedures."[14] The court did not squarely answer the question, ultimately sidestepping the problem by holding that any procedural error was harmless.[15] Thus, the Commission should now follow the Fifth Circuit's procedural roadmap and make policy by rule instead.

II. The Commission Should Adopt Differentiated Time Frames for More Narrowly Defined Classes of Deployments.

TIA supports the Commission's proposal to adopt shorter time frames for different types of siting applications not already covered by the Spectrum Act.[16] Many small cell deployments will have a much lower impact on communities than traditional 200-foot towers, and the timelines for approval should naturally reflect this.

Aside from the obvious benefits, such an approach could place the Commission's actions in this proceeding on firmer legal ground. Section 332(c)(7)(B)(ii) requires a locality to act

[13] 668 F.3d at 253 (emphasis added).

[14] *Id.* at 242.

[15] *Id.* at 243-246.

[16] NPRM ¶ 18.

"within a reasonable time, *taking into account the nature and scope of such request*."[17] In *City of Arlington*, the Fifth Circuit upheld the Commission's creation of a rebuttable presumption regarding 90-day and 150-day shot clocks as being a valid construction of the statutory language regarding "reasonable time." However, a reviewing court could conceivably hold that a one-size-fits-all irrebuttable presumption is impermissible, on the theory that "the nature and scope" of an application cannot be considered via efforts by the locality to rebut the presumption.

To avoid this problem, the Commission should therefore be sure to adopt multiple standards – at least more than one – to address different types of deployments, and explain its reasons for doing so. The Commission's actions in the rulemaking itself would then more clearly demonstrate its consideration of the "nature and scope" of different application types, and would greatly simplify the work of a reviewing court seeking to apply *Chevron* deference[18] to the Commission's actions.

III. The Commission Should Provide Better Guidance for State and Local Governments.

TIA acknowledges that many states and localities, particularly small ones, may face challenges in implementing the Commission's directives. As a complement to its efforts in this proceeding, the Commission should bolster its efforts to provide guidance to states and localities on best practices, as well as their legal obligations. The recent creation of a Broadband Deployment Advisory Committee ("BDAC") is a very promising step, and the Commission should step up those efforts in tandem with this proceeding to ensure that state and local governments are partners, not adversaries, in the desire to deploy better services for their constituents.

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[17] 47 U.S.C. § 332(b)(7)(B)(ii) (emphasis added).

[18] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984).

IV. Conclusion

Actions are clearly needed to promote wireless facilities deployments, and the measures proposed in the NPRM represent a concrete and productive step forward. TIA strongly supports the proposals in the NPRM and appreciates the Commission's efforts in this proceeding.

Respectfully submitted,

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June 15, 2017